

MEMORANDUM OF LAW

DATE: May 21, 1993

TO: Judy Folsom via Larry Grissom, Retirement
Administrator

FROM: City Attorney

SUBJECT: COBRA Continuation Coverage

Pursuant to your request, we have reviewed the procedures and forms you have prepared to ensure compliance with the Consolidated Omnibus Budget Reconciliation Act ("COBRA") of 1986. We have also responded to your specific questions concerning COBRA. Our review follows:

BACKGROUND

In response to growing concern over individuals' loss of health insurance when coverage under an employer sponsored group plan was terminated, Congress included coverage continuation requirements in Title X of the Consolidated Budget Reconciliation Act of 1985 ("COBRA"). Signed into law in 1986, COBRA requires certain employers who sponsor group health plans to offer employees and their families continuation coverage at group rates that otherwise would have been forfeited under certain situations. Title X of COBRA amended the Employee Retirement Income Security Act ("ERISA"), the Internal Revenue Code ("IRC"), and the Public Health Service Act ("PHSA") for purposes of health plan coverage.

Private employers are bound by COBRA's amendments to the IRC. Although governmental health plans as defined under IRC section 414(d) (such as those sponsored by the City of San Diego and SDCERS) are exempted from the COBRA amendments to the IRC, they are governed by parallel requirements set forth in COBRA's amendments to the PHSA. 42 U.S.C. section 300bb-1 et seq.

Under the PHSA, COBRA provides that state and local governmental group health plans must provide continuation coverage to certain individuals. Section 300bb-1 provides in pertinent part:

Each group health plan that is
maintained by any State that receives
funds under this Act, by any

political subdivision of such a State, or by any agency or instrumentality of such a State or political subdivision, shall provide . . . that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan.

Under COBRA, "family group health plan is any plan maintained by an employer to provide medical care . . . to the employer's employees, former employees, or the families of such employees or former employees, whether directly or through insurance, reimbursement, or otherwise, . . . or through a cafeteria plan . . . or other flexible benefit arrangement." 52 Fed. Reg. 22716-01, question and answer ("Q&A") 7(a) (1987). A qualified beneficiary is:

Any individual who, on the day before a qualifying event, is covered under a group health plan maintained by the employer of a covered employee by virtue of being on that day either (1) the covered employee, (2) the spouse of the covered employee, or (3) the dependent child of the covered employee.

42 U.S.C. section 300bb-8 (1991); 52 Fed. Reg. 22716-01, Q&A 15(a) (1987).

For COBRA purposes, a qualifying event includes death, divorce (or legal separation), termination of employment (or reduction of hours), medicare entitlement or reaching the age of majority. 42 U.S.C. section 300bb-3. Retirement which results in a loss of coverage to the employee or a qualified beneficiary is also a qualifying event. 52 Fed. Reg. 22716-01, Q&A 16(a) and 18(e) (1987). "Loss of coverage" has been interpreted to mean that the employee or qualified beneficiary is no longer covered under the same terms and conditions as in effect immediately before the qualifying event. 52 Fed. Reg. 22716-01, Q&A 18(c) (1987). Upon the occurrence of a qualifying event, the employee and each qualified beneficiary is entitled to make a separate selection among coverages, to the extent that choices are available. 42 U.S.C. section 300bb-5 (1991).

Under COBRA, a covered employee has at least sixty (60) days from the qualifying event (date the employee would lose

coverage) to inform the City that he/she wants the continuation of coverage. 42 U.S.C. section 300bb-5(1); 52 Fed. Reg. 22716-01, Q&A 32 (1987). If continuation of coverage is chosen, the City is required to offer coverage identical to the coverage provided under the Plan to similarly situated employees or family members. 42 U.S.C. section 300bb-4. The continuation of coverage may be cut short for any of the following reasons:

1. City of San Diego no longer provides group health plan coverage to any of its employees;
2. The premium for the continuation coverage is not paid in a timely fashion;
3. The covered employee becomes covered under another group health plan that does not include a preexisting condition clause that applies to the covered member or to a covered dependent; or,
4. The covered member becomes entitled (enrolled in) to Medicare.

The covered employee may have to pay all or part of the premium for the continuation of coverage. There is a 30-day grace period for paying the premium. 42 U.S.C. section 300bb-2(2)(c); 52 Fed. Reg. 22716-01, Q&A 48(b) (1987). Continuation coverage charges may not exceed 102% of the group health plan costs. 42 U.S.C. section 300bb-2(3); 52 Fed. Reg. 22716-01, Q&A 44 (1987).

COBRA requires further that the group health plan provide, at the time of commencement of coverage under the plan, written notice to each covered employee and spouse of the employee (if any) of the rights to continued coverage pursuant to COBRA. Additional notice requirements triggered by a qualifying event are also described in 42 U.S.C. section 300bb-6 (1991).

Questions and Answers

Question No. 1: Should COBRA notices be sent by the Risk Management Department to active members upon retirement?

Answer: Yes. COBRA requires the City to offer COBRA coverage to covered employees and qualified beneficiaries upon the occurrence of a qualifying event. One of the "qualifying events" specified in COBRA is the termination of a covered employee's employment, other than by reason of such employee's gross misconduct, which results in a loss of coverage to the employee or a qualified beneficiary. 42 U.S.C. section 300bb-3 (1991). This definition includes retirement. 52 Fed. Reg. 22716-01, Q&A 16(a) and (18)(e) (1987).

Moreover, "loss of coverage" has been interpreted to mean that the employee or qualified beneficiary is no longer covered

under the same terms and conditions as in effect immediately before the qualifying event. 52 Fed. Reg. 22716-01, Q&A 18(c) (1987). Since retiree and dependent health insurance premiums may increase upon retirement in certain City sponsored plans, COBRA notices must be sent to those individuals participating in those plans. If there is no change in coverage, COBRA notices are not required.

Question No. 2: Does the potentially substantial increase in the premium for the same coverage violate COBRA?

Answer: No. It is our understanding that the Risk Management Department mails COBRA letters to all retirees, their spouses and their dependents. The retiree, retiree's spouse or dependent has the option of continuing payment of the active member premium plus the administrative fee for the COBRA coverage period or enrolling in the City sponsored retiree group health insurance plan. Since the retiree and his or her spouse or dependents are given the opportunity to elect COBRA continuation coverage under the same terms and conditions for active members, we see no COBRA violation.

Question No. 3: Is the City precluded from making payments by the qualified beneficiary to insurance carriers due on the 10th of the month preceding coverage and late on the 10th of the month during the month of coverage?

Answer: Yes and No. Although the Retirement System can request payment in advance, it cannot force members who have elected COBRA continuation coverage to pay for their month of coverage prior to the thirty day grace period provided by COBRA.

As background, we note a qualified beneficiary can be required to pay for COBRA continuation coverage as long as the amount required to be paid does not exceed 102 percent of the applicable premium for that period. 52 Fed. Reg. 22716-01, Q&A 44 (1987). In addition, a group health plan must allow a qualified beneficiary to pay for COBRA continuation coverage in monthly installments. A group health plan can also allow qualified beneficiaries the alternative of paying for COBRA continuation coverage at other intervals (e.g., quarterly or semiannually). 52 Fed. Reg. 22716-01, Q&A 46 (1987). Generally, the first payment for COBRA continuation coverage is applied to the period of coverage beginning immediately after the date that coverage under the plan would have been lost on account of the qualifying event. 52 Fed. Reg. 22716-01, Q&A 47 (1987).

Timeliness of payments for COBRA continuation coverage is addressed in Q&A 48. It provides:

If a qualified beneficiary's election of COBRA continuation coverage is made after the date of the qualifying event, timely payment for any COBRA continuation coverage during the period before the date of the election means payment that is made to the plan within 45 days after date of the election. Timely payment for any other period of COBRA continuation coverage is governed by paragraph (b) of this Q&A 48.

Paragraph (b) of Q&A 48 provides in pertinent part: "In general, timely payment for a period of COBRA continuation coverage under a group health plan means payment that is made to the plan by the date that is 30 days after the first day of the period."

Currently, the Retirement System's insurance premiums are due each month on or before the last day of the preceding month. The insurance carriers are paid by the System between the 10th and 15th during the month of coverage. To further illustrate the current situation, take, for instance, the October payment, which would be due by October 15th. The COBRA member sends his October insurance payment to the City Treasurer by the end of September (i.e., September 30th). Then, that payment is deposited or automatically transferred from the City to the insurance company by the 15th of October. The COBRA member, in effect, is paying for the month of coverage in advance. This is not a violation under COBRA in respect to Q&A 48(b). While it is permissible for the Retirement System to ask for payments in advance (as under the current schedule), it would only be in violation of COBRA to force members to pay for their month of coverage prior to the 30 day grace period allotted. In other words, the Retirement System may ask the COBRA members to send in their October payment by the end of September. However, the Retirement System may not consider the payment late if it arrives by the end of October.

Question No. 4: Are non-Medicare eligible spouses and/or dependent children whose initial date of coverage is after the Medicare enrollment date of the member eligible for COBRA continuation coverage upon the death of that member?

Answer: Yes. When a covered member becomes entitled to Medicare, his/her COBRA benefits terminate. Before going any further, a common misconception must be clarified. Being

"entitled" to Medicare means that the person is actually on Medicare. Mere eligibility for Medicare does not mean that COBRA benefits are terminated. As such, being Medicare-eligible has no effect on COBRA benefits unless the individual is actually covered under Medicare.

The Retirement System asks whether the non-Medicare eligible spouse and/or dependent children whose initial date of coverage is after the Medicare enrollment date of the member is eligible for COBRA continuation coverage upon the death of a member. For example, when the covered member enrolls in Medicare, the member's continuation coverage under COBRA terminates. Then, when that covered member dies, are the member's spouse and/or dependents still entitled to continuation of coverage, even though the covered member's rights to COBRA were terminated by Medicare enrollment?

Under COBRA, whether it is the covered member (employee) or a qualified beneficiary (spouse and/or dependent child), each individual is treated independent of the other. While the spouse and/or dependent children were initially dependent on the covered member's status for health plan enrollment, continuation of coverage under COBRA for these individuals is independent of the covered member's Medicare status. Even if the employee-member becomes entitled to Medicare, the member's spouse and/or dependent-children are still entitled to COBRA benefits, including the election notice. Thus, upon the death of a member who is enrolled in Medicare, the member's spouse and/or dependent-children are entitled to COBRA benefits as long as the respective qualified beneficiary is not enrolled in Medicare.

Question No. 5: Should active member Citymed participants be mailed COBRA continuation election notices upon retirement, even though the continuation coverage may differ?

Answer: Yes. See answer to Question No. 1.

Question No. 6: Is there any conflict with COBRA by handling members of the same group differently?

Answer: Maybe. It is our understanding that this question addresses the procedures for COBRA notification for qualifying events affecting retirees, their spouses and dependents and further the availability of continued group health care coverage as participants (rather than as dependents) for certain spouses upon the death or divorce of a covered retiree.

Specifically, the Retirement System's current procedure for participation of surviving spouses in group health plans is as follows:

1. Upon the death of the retiree, if the spouse will receive a continuance, the spouse may participate (as a participant) in one of the group health plans for an indefinite period via payroll deductions. A COBRA election notice is not sent.
2. If the spouse will not receive a continuance, the Retirement System mails a COBRA election notice advising the spouse of the 36 months of continued coverage available under COBRA. The spouse is not offered the opportunity to participate in any of the group health plans.

A similar procedure exists for divorced spouses of retirees as follows:

1. Upon the divorce of a retiree, if the ex-spouse receives part of the retiree's retirement allowance via a monthly check, the ex-spouse may have the health insurance premium deducted from his or her monthly check. A COBRA election notice is not sent.
2. If, however, the ex-spouse does not receive a monthly check, a COBRA election notice is sent. The ex-spouse is not offered the opportunity to participate in any of the group health plans.

We have several concerns about the procedures used for surviving spouses and ex-spouses of retirees. First, COBRA requires that COBRA election notices be sent whenever there is a qualifying event resulting in a loss of coverage. The death or divorce of a retiree would be a qualifying event for the spouse or any dependents in any of the situations described above. As such, a COBRA election notice should be sent to surviving spouses regardless of whether he or she receives a continuance. COBRA election notices should also be sent to the spouses of any retiree who divorces after retirement.

Second, we also have concerns with an appearance of discriminatory treatment. Under current procedures, spouses with continuances or ex-spouses receiving a portion of the member's retirement allowance via a monthly check are given the opportunity to participate in the group health plans at group rates as participants indefinitely whereas surviving spouses not receiving continuances or ex-spouses not receiving a portion of the retiree's retirement allowance via a monthly check are not. We do not have enough information, however, to assess this situation fully.

At your convenience, we recommend that you review your records to determine: 1) Those persons (retirees, their spouses

and/or their dependents) currently receiving COBRA benefits and the length of time COBRA benefits have been provided; 2) The identity of those surviving spouses or ex-spouses enrolled as participants in one of our group plans, the length of time they have been enrolled in the plan and the plan they have been enrolled in; 3) The criteria for eligibility to participate in any of the group health plans offered to our retirees and their dependents; and finally 4) Any written materials provided to our retirees and their dependents describing our health plans, their availability and any information as to who can participate in the plan at the group rates. We remain available to provide any assistance necessary.

Question No. 12: Is a Medicare eligible surviving spouse of a member who is not entitled to a continuance eligible for COBRA?

Answer: Yes. See response to Question No. 4.

We hope this Memorandum of Law has addressed your concerns. Please contact us if we can be of further assistance.

JOHN W. WITT, City Attorney

By

Loraine L. Etherington

Deputy City Attorney

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